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In The

Supreme Court of the United States

October Term, [redacted] 1925

No. [redacted] 312

WESTERN PAPER MAKERS' CHEMICAL COMPANY,
and the
TANGLEFOOT COMPANY,
Plaintiffs and Appellants,

v.

THE UNITED STATES, and
THE INTERSTATE COMMERCE COMMISSION,
Defendants and Appellees.

APPELLANTS' MOTION FOR DIMINUTION OF RECORD FOR PRINTING AND BRIEF IN SUPPORT THEREOF.

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In The

Supreme Court of the United States

October Term, 1924.

No. 982.

WESTERN PAPER MAKERS' CHEMICAL COMPANY,
and the
TANGLEFOOT COMPANY,
Plaintiffs and Appellants,

v.

THE UNITED STATES, and
THE INTERSTATE COMMERCE COMMISSION,
Defendants and Appellees.

APPELLANTS' MOTION FOR DIMINUTION OF RECORD FOR PRINTING.

The above named plaintiffs and appellants respectfully show unto the court as follows:

I.

That the above entitled case is an appeal from a final decree made by the district court for the Western District of Michigan, denying plaintiffs' application for an injunc-

tion to restrain an order of the Interstate Commerce Commission fixing a through freight rate on rosin from points of origin to Kalamazoo and Grand Rapids, Michigan. It was the contention of the plaintiffs in the court below that there was no substantial evidence before the Interstate Commerce Commission to sustain the rate of which complaint was made, and in order to sustain that averment in the bill, the plaintiffs, at the hearing in the court below, offered a certified copy of the transcript of the proceedings before the Interstate Commerce Commission, which tended to sustain the plaintiffs' contention that there was no evidence, so far as it related to said through freight rate on rosin. The court below entered a final decree dismissing the bill, and an appeal was duly perfected, and by special order of the court below, the original record was sent to the supreme court and has been duly docketed.

II.

That it will serve no useful purpose to court or counsel to have the certified copy of the voluminous proceedings before the Interstate Commerce Commission printed at length. That in order to properly review the case, all that need be printed is the pleadings, the final decree, and the orders of the Interstate Commerce Commission in relation to this rate. That under date of March 14, 1925, the clerk of the court advised plaintiffs' counsel that he should deposit within ninety days from the date the case was docketed, namely, March 12th, 1925, $7,370.00, covering the following items:

Clerk's costs	$1865.00
Cost of printing record	5530.00
Total	$7395.00
Amount already deposited	25.00
Balance to be deposited	$7370.00

The appellees are the Government and The Interstate Commerce Commission and under the law these costs may not be collected of them if appellants prevail.

III.

After receiving the notice from the clerk, the plaintiffs made a designation for printing, under the rule, designating for printing only the parts of the record necessary to raise the questions sought to be reviewed; a copy of which designation for printing is hereto attached and made a part hereof. That said designation for printing was amended by telegram to the clerk, and a copy of this amended form and a copy of the court's opinion below is attached and made a part hereof. That notice of this amended designation to print was duly served upon counsel upon the opposite side, and thereafter the appellants' attorney received notice by registered mail of the designation to print on the part of the appellees, designating for printing the entire record (for the printing of which the clerk made the estimate of $7,370.00) except Exhibit 17, which had been withdrawn in the proceedings before the Interstate Commerce Commission.

IV.

The proceedings before the Interstate Commerce Commission consist of the evidence of various witnesses taken by question and answer. Many of these witnesses offered in connection with their testimony, exhibits consisting of maps, schedules and other articles which are all of negligible value in determining the questions, so far as they relate to the through freight rate on rosin involved in this controversy. Counsel for the Interstate Commerce Commission expressed a willingness to reduce the testimony taken by question and answer to narrative form, and submitted a narrative form consisting of three hundred sixty-one pages, but expressed a desire to have also printed all the schedules and maps referred to by these various witnesses. Counsel for the appellants is advised by the clerk of the court that this narrative form may not, under the rules of the court, be printed in the regular volume of the printed record, but must be in a supplemental volume. However, if the appellants are required to print the numerous maps and schedules and the three hundred sixty-one pages of the narrative form the questions and answers before the Interstate Commerce Commission, the clerk's fees and the printing fees will amount to several thousand dollars, estimating them on the basis of the clerk's previous figures, it would amount to upwards of five thousand dollars, and it would be impossible for the appellants to expend this amount of money in order to have the case reviewed; and if this printing requirement is to stand, it will be impossible for the appellants to present their case to this court.

Wherefore the appellants pray that an order may be made for a diminution of the record on printing, and that such order shall provide that the printed record shall contain the following: The pleadings; the opinions and decrees of the District Court, together with the orders of the Interstate Commerce Commission concerning said through

freight rate on rosin; with leave to either party in their oral arguments, or in their printed briefs, to set out or refer to any special portion of the certified copy of the proceedings before the Interstate Commerce Commission; that such other and further order may be entered on this motion as to the court may seem just and proper.

Harry C. Howard,
Attorney for Plaintiffs
and Appellants.

Dated April 30, 1925.

State of Michigan,
County of Kalamazoo—ss.

Harry C. Howard, being duly sworn, deposes and says, that he is the attorney for the above named plaintiffs and appellants, and makes this verification for and in their behalf, and is duly authorized so to do. That he has read the foregoing motion by him subscribed and knows the contents therein, and that the same is true of his own knowledge, except matters and things alleged on information and belief, and as to those matters, he believes it to be true.

Lois M. Field,
Notary Public,
(Seal) Kalamazoo County, Mich.
My commission expires Oct. 28, 1927.

IN THE SUPREME COURT OF THE UNITED STATES.

Western Paper Makers' Chemical Company, and
Tanglefoot Company,
Plaintiffs and Appellants,
v.
The United States, and
The Interstate Commerce Commission,
Defendants and Appellees.

No. 982.
October Term, 1924.

DESIGNATION FOR PRINTING PARTS OF RECORD UNDER SUPREME COURT RULE 10.

To the Clerk of the Supreme Court:

The appellants hereby state the points upon which they rely to be as follows:

1. That there was no evidence before the Interstate Commerce Commission from which the Interstate Commerce Commission could fix the through rate on rosin from points of origin to the cities of Kalamazoo and Grand Rapids, Michigan, as fixed by said Commission in its findings, a copy of which is attached to the bill of complaint.

2. That the through freight rates on rosin from points of origin to Kalamazoo and Grand Rapids, Michigan, are unjustly discriminatory and violative of the "long and short haul" clause, Section 4 of the Interstate Commerce Act, both of which points are raised in detail in assignments of error, and the appellants designate the parts of the record which they think necessary for the consideration of the court to be as follows:

APPELLANTS' DESIGNATION FOR PRINTING.

1. Bill of complaint with Exhibit 1 (being 87 I. C. C., 740) and Exhibit 2 (being 89 I. C. C., 634) attached.

2. Order of Interstate Commerce Commission (91 I. C. C., 223).

3. Answer of Interstate Commerce Commission.

4. Answer of U. S.

5. Opinion of District Court on motion for interlocutory injunction.

6. Final decree (filed Jan. 3, 1925).

7. Petition for appeal and order allowing appeal.

8. Assignments of error.

9. Bond on appeal.

10. Petition for transmission of original record on appeal.

11. Order directing transmission of original record.

12. Acceptance of service of citation on appeal by attorney general of Michigan.

13. Acceptance of service of citation on appeal by P. J. Farrell, attorney for I. C. C.

14. Acceptance of service of citation on appeal by Sol. Gen. of U. S.

15. "Examiner Carter: I will rule that I will accept these exhibits at this time for the purpose of showing the historical chronological situation of the specific (stenographer's transcript, 378) and so forth and I will reserve my ruling on the other until later in the hearing. But at this time they are received simply for that purpose and not as justification of any part of the through rate (stenographer's transcript, 379).

Examiner Carter: I might say that my ruling on Mathews' Exhibits 65 and 66 was deferred the other day on the question of justifying the measure of the rate north of the river. I sustain the objection to those exhibits for that purpose and admit them as I stated before for the purpose of showing the historical chronological situation (stenographer's transcript at end of testimony)."

Western Paper Makers'
Chemical Company,
Tanglefoot Company,
By.....
Their duly authorized
attorney.

Dated March 28, 1925.

OPINION DISTRICT COURT.

THE DISTRICT COURT OF THE UNITED STATES—
For the Western District of Michigan, Southern Division.

Filed October 28, 1924,

Chas. L. Fitch, Deputy Clerk.

Western Paper Makers' Chemical Company, and Tanglefoot Company, v. United States of America, and Interstate Commerce Commission.	In Equity. No. 2017.

Before Denison, Circuit Judge, Knappen, Retired Circuit Judge, and Sessions, District Judge.

Per Curiam:

Hearing on motion for interlocutory injunction in a suit to modify an order of the Interstate Commerce Commission, establishing tariffs on certain naval stores so far as they relate to rail rates on rosin from points south of

the Ohio river to the cities of Kalamazoo and Grand Rapids, Michigan. Both plaintiffs are Michigan corporations, the Paper Company doing business at Kalamazoo and the Tanglefoot Company at Grand Rapids, both being in central territory. Each plaintiff receives annually by freight large quantities of rosin shipped to it at its place of business above stated from points of origin in certain southern states. This hearing was had before three judges under the Act of October 22, 1913, C. 32 (38 St., 220; U. S. Comp. St., 1916, Sec. 998).

It appears from the Commission's report, without challenge, that practically the entire production of naval stores in the United States is in Florida, Georgia, Louisiana, Mississippi, Texas and the Carolinas, the first three states named being the heaviest producers, and relatively as to each other in the order above given; the largest production is at the interior points, from which shipments are made by rail to South Atlantic and Gulf ports, where they are concentrated and crated and shipped by water or rail to destination. Savannah and Jacksonville are the principal South Atlantic ports, and Pensacola, Mobile and Gulfport the principal gulf ports, between which and the South Atlantic parts of competition has become very keen.(1)

The Commission's order here attacked was made as the result of a suspension proceeding ordered by the Commission because of protests by producers and dealers in and shippers of naval stores, including plaintiffs, against a proposed comprehensive revision by carriers, in both the Southeastern and Mississippi Valley territory, of the rates on naval stores from all points of production. By the then prevailing tariffs, the rates from all South Atlantic ports to a given destination were the same, regardless of specific origin, some through rates being published to certain points

1. Broadly speaking, the territory east of the line of the Louisville & Nashville Railroad from Decatur, Alabama to Pensacola, Florida, is called Southeastern territory, and west of that line, Mississippi Valley.

in certain territory, made up of the local rate to the Ohio river plus a "specific," published by the line north of the river, A "specific" as stated by the Commission, is "said to be neither a local rate nor a division of a through rate, but in the nature of a proportional" (87 I. C. C., 742). From some producing points in Southeastern territory the rates to destination points were affected by certain locals. Rates from the Gulf ports had always been lower than from interior producing points in the Mississippi Valley. Because of competition between South Atlantic and Gulf ports, there was some relation between rates from all the ports, and at the time of the proposed revision the rates from all the ports to Cincinnati were the same. The rates from New Orleans to Chicago had been influenced by the single-line rates of the Illinois Central, and were lower than to other points in Central territory.

By these tariffs the rate on rosin to Cincinnati was 27 cents per 100 lbs.; to Chicago, 39 cents from South Atlantic and 30 cents from Gulf ports; to Detroit, 39.5 cents from South Atlantic and 33 cents from Gulf; to Milwaukee 44.5 cents from South Atlantic and 33 cents from Gulf; to Kalamazoo 39 cents from South Atlantic and 34.5 from Gulf; to Grand Rapids 44.5 from South Atlantic and 34.5 from Gulf. Chicago's rate from the Gulf ports was thereby 9 cents, Milwaukee's 11.5 cents, Detroit's 6.5 cents, Kalamazoo's 4.5 cents and Grand Rapids 10 cents lower than from South Atlantic ports.

By the proposed revision it was sought to equalize rates from all producing territory to Cincinnati, by increasing rates from the ports, the rates from the greater part of the territory being blanketed. To other river crossings the proposed rates were either the same as, of differentials over or under, the rates to Cincinnati. For example, the Cincinnati rate, while still the same from all ports, both Gulf and South Atlantic, was to be increased from 27 cents to 33 cents. To points beyond the Ohio river new and higher specifics, furnished by lines operating beyond

the river, were to be added. Chicago, Milwaukee and other related points, however, were given by certain carriers(2) lower rates than proposed for Ohio River combinations, on the ground that single-line rates of the Illinois Central from New Orleans required the Southeastern lines to establish lower rates to Chicago in order to meet the Illinois Central competition. To illustrate: The rate to Chicago from South Atlantic ports was proposed to be increased to 41 cents from the then existing rate of 39 cents, and from the Gulf ports to 37 cents from the then existing rate of 30 cents. The rate to Milwaukee from Gulf ports increased from 33 cents to 40 cents while from South Atlantic ports it decreased from 44.5 cents to 44 cents; the rates to Kalamazoo and Detroit were increased to 47.5 cents and to Grand Rapids 48 cents from both South Atlantic and Gulf ports.

Upon full hearing, to which both plaintiffs were parties, the Commission found the proposed new rates not justified, ordered a cancellation of the suspended schedules and found the following to be just and reasonable rates for the future from South Atlantic and Gulf ports respective(3): Cincinnati, 33 cents, both routes; Chicago, 40 cents and 37 cents; Milwaukee, 41 cents and 38 cents; Kalamazoo, 40 cents and 39 cents; Grand Rapids, 41 cents and 40 cents; Detroit, 40 cents by both routes (87 I. C. C., 754). The rate to Milwaukee was later made 42 cents and 39 cents, thus mak-

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2. These carriers were Chicago & Alton; Chicago & Eastern Illinois; Chicago, Burlington & Quincy; Chicago, Indianapolis & Louisville; Illinois Central; Louisville & Nashville and Southern. Rates by other carriers were the full combination of local rates to Cincinnati and specific beyond (87 I. C. C., 746).

3. The first rate state is South Atlantic. We find it unnecessary to set out the rates to other points than given in this opinion or to cover rates on turpentine, which, although involved in the Commission's hearing, are not in issue here.

ing the South Atlantic rate to Kalamazoo the same as to Chicago and Detroit, and the rate to Grand Rapids one cent less than to Milwaukee; and from the Gulf the rate to Milwaukee 2 cents higher than to Chicago, and to Grand Rapids one cent higher than to Milwaukee (89 I. C. C., 637; 91 I. C. C., 226). It is these rates to Kalamazoo and Grand Rapids, so found by the Commission to be just and reasonable, which the bill before us seeks to set aside.

Plaintiffs' main contention, broadly stated, is that there was no evidence before the Commission supporting the rates to these two cities as so finally fixed.

Recognizing the fundamental rule that an order of the Commission fixing rates is invalid unless supported by evidence (*Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., 88, 91; New England Divisions Case, 261 U. S., 184, 203, 204 and cases there cited*), this court cannot weigh the testimony as to the reasonableness of the rates or the wisdom of establishing them. Those subjects are finally committed to the judgment and discretion of the Commission, when acting within its power. *Proctor & Gamble v. United States, 225 U. S., 282, 297, 298; New England Divisions Case, 246 U. S., 457, 481; Seaboard Air Line Ry. Co. v. United States, 254 U. S., 57, 62.*

We do not understand plaintiffs to deny that the subject-matter was within the Commission's jurisdiction and power. Its findings are made by the law *prima facie* true, and the Supreme Court has ascribed to them "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S., 441, 454; Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry., 218 U. S., 88, 110; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S., 541, 546.*

A finding of the fact of reasonableness of a rate can thus not be pronounced arbitrary or unreasonable if there was competent evidence in its support. In the view we

take of the case, we find it unnecessary to decide whether the rule that the burden of proof is upon the carrier to show the reasonableness of its proposed increase in rates (*Interstate Commerce Act, Par. 7, Sec. 15*) applies to rates prescribed by the Commission after a hearing upon the proposed increases. See Par. 2, Sec. 15-a of the Act 4. The entire record before the Commission is in evidence here.

Plaintiffs concede that on the hearing before the Commission the lines south of the Cincinnati gateway offered evidence tending to show the reasonableness of that portion of the through rate from the points of origin to the river. The testimony so introduced related to both South Atlantic and Gulf port rates. The Cincinnati rate therein concerned is the same that the Commission found reasonable, viz: 33 cents. The substantial criticism thus necessarily is that there was no testimony sustaining the specifics north of the river or of the rate as a through rate. But while we are cited to no direct testimony of the reasonableness of any one through rate or specific, there was testimony tending to show that the suspended rates from Ohio River crossings north, on the basis of rates south of the river as factors, were reasonable (see 87 I. C. C., p. 747). And we think that for this and other reasons there cannot be said to be an absence of competent evidence thereof. It affirmatively appears that the specifics with which we are concerned north of the river are substantially less than the "specifics" or proportionals in actual use for a substantial period prior to the proposed revision which was the subject of the suspension proceeding. For example: Kalamazoo's old South Atlantic rate of 39 cents was 12 cents above the then river rate of 29 cents. By the 40 cent southeastern rate to Kalamazoo which the Commission adopted the specific is but 7 cents above the new river

4. The Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

rate. By the old Gulf schedules Kalamazoo's rate of 34.5 cents was 4.5 cents above Chicago and 7.5 cents above Cincinnati, while her new rate of 39 cents is but 2 cents above Chicago and 6 cents above Cincinnati. Grand Rapids' old South Atlantic rate of 44.5 cents was 17.5 cents above the River rate, while her new rate is but 8 cents above the River rate. Her old Gulf rate of 34.5 cents was 4.5 cents above Chicago and 7.5 cents above Cincinnati, while her new Gulf rate is but 3 cents above Chicago and 7 cents above Cincinnati. The increases of Kalamazoo's rates by both routes and of Grand Rapids' Gulf rate were thus not only due entirely to the increases of rates to the River and (apparently) to Chicago especially, but represented an actual decrease of specific. As has already appeared, Grand Rapids South Atlantic Rate is 3.5 less than her old rate, while Kalamazoo's South Atlantic rate is but one cent higher than her old.

Again, prior to the publication of the suspended tariffs rates from the southeast to various destination territories were published on the "sectional plan," the factors to and from the river crossings being named in the tariffs. For example: The tariff from Jacksonville to Kalamazoo was shown as 27 cents to Cincinnati and 12 cents beyond. From the Gulf ports to Kalamazoo the rate was 34.5 cents. As the rate to Cincinnati was given as 27 cents, there was left 7.5 cents for the haul from Cincinnati to Kalamazoo. Each of these old specifics was thus substantially larger than the specific under the rates here under attack. We think it clear that the long-continued existence of established rates made up of a key rate to the River (or to Chicago), and which came into the instant case through an effort by the carriers to establish higher rates, was at least some evidence of the reasonableness of the new specific contained in the rates adopted by the Commission. We see no merit in the suggestion that the testimony of the reasonableness of the "specific" was incompetent. Upon the issue of *reasonableness* the propriety of each factor was both competent and material, notwithstanding in the proposed new

tariff the rate was published as a through rate. What we have said about the specifics or proportionals north of the river applies equally to both South Atlantic and Gulf rates, so far as through rates were based thereon. Further, the Commission had before it not only comparative distances from representative points of shipment in both South Atlantic and Gulf territory to destinations including Kalamazoo, Grand Rapids, and such comparable points as Cincinnati, Chicago, Milwaukee and Detroit, but tables showing ton-mile earnings and car-mile earnings from representative points of shipment, in both Gulf and South Atlantic territory, under both the old and the suspended tariffs, by the shortest workable routes to each of the destinations given immediately above.(5) We think the rates here assailed must be sustained unless unjustly discriminatory as against Kalamazoo and Grand Rapids, or both, or unless violative of the "long and short haul" clause (section 4) of the Act. By plaintiffs' brief in this court the charge of discrimination is, at best, faintly presented. The bill alleges generally that rates from the Gulf ports to Kalamazoo are higher than from the same point of origin to Chicago, although the latter is the longer haul; that the rates from Mississippi Valley territory to Grand Rapids are higher than the rates from the same points of origin to Milwaukee, "which is a longer haul"; and, more specifically, that the rate to Cincinnati was described by the carriers at the suspension hearing to be the key-rate to the territory beyond; that the distance from Cincinnati to Kalamazoo is less than to either Chicago or Milwaukee, and from Cincinnati to Grand Rapids less than to Milwaukee; that transportation conditions to Kalamazoo and Grand Rapids were not shown to be less favorable than to Chicago and Milwaukee, and thus that Kalamazoo is directly intermediate to Chicago and Milwaukee, and Grand Rapids directly intermediate to Milwaukee by way of various worked and workable routes. It will be observed

5. See Commission's report in suit by plaintiffs against Director General, 91 I. C. C., 224-225.

that no charge of discrimination in South Atlantic rates is made.(6) Indeed, that rate to Kalamazoo is the same as to Chicago and Detroit, and two cents less than to Milwaukee, and to Grand Rapids is one cent less than to Milwaukee. From the Gulf territory, however, Kalamazoo's rate is the same as Milwaukee's, viz: one cent less than Detroit's, but two cents higher than Chicago's; and Grand Rapids' rate is one cent higher than Milwaukee's. But the direct and logical route from Cincinnati to Kalamazoo and Grand Rapids does not pass through either Chicago, Milwaukee or Detroit. Nor does the direct and logical route from Chicago to Milwaukee pass through either Kalamazoo or Grand Rapids. Moreover, by one of the comparative earning schedules before referred to, the distance from Mobile (7) to the points involved here were: to Cincinnati, 750 miles, Chicago (which is nearly 300 miles from Cincinnati), 858 miles; Milwaukee, 943 miles, Kalamazoo 964 miles; Grand Rapids 1011 miles, and Detroit 1021 miles. The Commission found that "Because of the absence of routing instructions Kalamazoo and Grand Rapids are technically intermediate to Chicago, Detroit and Milwaukee, by possible routes, although the record indicates that

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6. Unless possibly as between Grand Rapids and Chicago. But apart from the influence of the lower Gulf rates to Chicago, it is a mistake to say that the distance from Cincinnati to Grand Rapids is less than to Chicago. We are cited to no reference, and we know of none supporting the statement in plaintiffs' brief, that the Commission finds that "there is no justification for the through rate to Grand Rapids which is higher than the rate to Chicago," if intended to refer to the new rate established by the Commission. Its findings are to the contrary. (87 I. C. C., at page 754; 91 I. C. C., at page 227).

7. Mobile would seem to be a fairly representative Gulf port. The Commission says that "distances are stated by the parties to have been computed by the shortest workable routes." 91 I. C. C., 225.

actual movement over such routes would be unusual. (91 I. C. C., 225).

The Commission further found that the Illinois Central controls the rates from New Orleans to Chicago, and hence to Milwaukee, and that other carriers serving New Orleans and the other Gulf ports meet the New Orleans-Chicago rate so made (91 I. C. C., 226). We think that neither of these findings nor the basing of the Mississippi Valley rate to Milwaukee upon the Chicago rate can be pronounced arbitrary or beyond the Commission's authority. It seems clear that by neither the old nor the later suspended Gulf port tariffs was the rate to Cincinnati regarded as the key-rate for Chicago and Milwaukee. The charge of discrimination therefore cannot be sustained. *Seaboard Air Line Ry. v. United States, 254 U. S., 57-62.*(8) We see no basis for the contention that the rates *established* by the Commission violate the Fourth Section of the Act. The Commission found that the suspended rates did have that effect, and in canceling those rates and ordering new rates denied applications for relief from Fourth Section departures, with leave later to apply for relief where ground should exist therefor (87 I. C. C., 756); and in modifying the rate from Milwaukee as before referred to, by reason of a charge of discrimination as against Kalamazoo and Grand Rapids, permitted—without requiring—the carriers to keep open routes from points in the eastern

8. By the old established Gulf Port tariffs rates to Cincinnati, Chicago and Milwaukee were, in the order above given 27 cents, 30 cents and 33 cents; by the suspended rates they were respectively 33 cents, 37 cents and 40 cents, while Kalamazoo's rate was 34.5 and 47.5. The rates from South Atlantic ports to the Louisville and Cairo river crossings, adopted by the Commission, were the same as to Cincinnati, viz: 33 cents; while the Gulf rates were in the case of Louisville one cent, and in the case of Cairo five cents, less than to Cincinnati, apparently due to the influence of the Illinois Central rates from New Orleans. (87 I. C. C., 754).

portion of the New Orleans group through Grand Rapids to Milwaukee by reducing the Grand Rapids rates from such points (89 I. C. C., 637); and in its later order dismissing plaintiffs' complaint, which asked injunction against the rate adjustment (91 I. C. C., 226-227), the Commission said not only that "The new adjustment will result generally in the removal of the existing Fourth Section departures in the origin territory," but "It is understood that the routing under the new adjustment will be so restricted as to remove the technical Fourth Section departures with respect to destination points hereinbefore referred to," which were Chicago, Milwaukee, Kalamazoo and Grand Rapids.

It results that the application for injunction must be denied.

At the hearing counsel for both parties orally expressed willingness that the final decree be made upon the record already submitted and the arguments made upon the motion. Should counsel still be so minded, they may file stipulation to that effect.

A. C. Denison,
Circuit Judge.
Loyal E. Knappen,
Circuit Judge.
C. W. Sessions,
District Judge.

In The

Supreme Court of the United States

October Term, 1924.

No. 982.

WESTERN PAPER MAKERS' CHEMICAL COMPANY,
and the
TANGLEFOOT COMPANY,
Plaintiffs and Appellants,

v.

THE UNITED STATES, and
THE INTERSTATE COMMERCE COMMISSION,
Defendants and Appellees.

BRIEF IN SUPPORT OF MOTION.

STATEMENT.

(Opinion below not yet published.)

This motion is for the diminution of the record to be printed on an appeal from a decree of the District Court for the Western District of Michigan dismissing appellants' bill of complaint praying for a decree enjoining the going

into effect of an order of the Interstate Commerce Commission putting into effect a through freight rate on rosin from points of origin in the South to Kalamazoo and Grand Rapids, Michigan.

On the hearing below a certified copy of the proceedings before the Interstate Commerce Commission was offered in evidence. The bill involved two theories:

1. That there was no substantial evidence before the Interstate Commerce Commission on which to base the order.

2. That the rate allowed a discrimination against Kalamazoo and Grand Rapids and was violative of the long and short haul clause of the Interstate Commerce Act.

Under the Act of Congress, Section 995 of the U. S. Compiled Statutes (Act, Oct. 22, 1913, C, 32), Section 999 U. S. Comp. St., 1916 (Jud. Code, Sec. 210) which contemplates certifying these original records on appeal, the entire record below has been duly certified and has been filed in the office of the clerk of the Supreme Court, and the clerk has advised appellants' counsel that it is necessary to deposit the sum of $7,370.00 to cover the clerk's fees and printing, within ninety days from the time the case was docketed, which was No. 982 of the October term. It was the contemplation of Congress that on these appeals an order sending up the original record contemplated a saving of expense and to permit an inexpensive and speedy hearing.

ARGUMENT.

The appellees in this case are the Government and the Interstate Commerce Commission, and under the law, if these costs are deposited and the appellants should prevail, it is impossible for them to collect these costs from the Government and the Interstate Commerce Commission. It may have been with this in mind that Congress authorized the returning of the original record on such appeals. The amount involved in this case is not large enough to warrant the appellants depositing this amount of money, and if they are required so to do, it will amount to denying their right to appeal.

After receiving this notice from the clerk, appellants designated, under the rule for printing, the part of the record which would seem to be sufficient to raise the questions necessary for consideration. Whereupon, counsel for the appellees designated the printing of the balance of the record, so at this writing, it is necessary to print the entire record, although the counsel for the appellees have submitted an agreed narrative form of the questions and answers given by the witnesses on the oral hearing before the Interstate Commerce Commission. Of this narrative form there are three hundred sixty-one (361) pages. We are perfectly willing to pay for the printing of that much of the record, and in addition, all the items which the appellants have designated for printing, as shown in the motion. This, in itself, will make a very bulky record, but we are willing to go to this expense in order that

the appeal may be heard. However, we urged below, and we are willing to stand on that here in this court, that the opinions of the Interstate Commerce Commission giving effect to the order of which complaint is made, show on their face that there was no substantial evidence before the Commission. We submitted a certified copy of the proceedings before the Commission on the hearing below so that counsel for the appellees could point to any special part of the record which contained any substantial evidence, and the District Court, in its opinion, a copy of which is on file with the clerk of this court (opinion below not yet published), said in substance that their attention had been directed to no special evidence, although they did point out that from the opinion of the Interstate Commerce Commission, itself, that the court deemed that they had some evidence upon which to base the order.

The proceedings of the Interstate Commerce Commission were merly an exhibit in the lower court and there is no reason why that exhibit should be printed at length for use in this court. The printing of it would only make a huge, unwieldly record which would be of no assistance at all to this court in deciding the appeal. Contained in this certified copy of the proceedings before the Interstate Commerce Commission were the questions and answers given by the witnesses. The witnesses introducing as part of their testimony prolix schedules and maps, few if any of them, relating to the through freight rate on rosin; having to do in many instances with rates on other commodities.

If before deciding this motion, a reference is made to the record which has been filed in the clerk's office, it will be seen that it is altogether unreasonable to print it. So far as the appellants are concerned, they are willing to pledge themselves to confine their argument on appeal to the facts set out in the opinions of the Interstate Commerce Commission and the District Court of the Western District of Michigan, and are entirely agreeable to the ap-

pellees referring to any portion of the record before the Interstate Commerce Commission which they desire to refer to, or print in their briefs.

Modern practice does not contemplate a prolix record—only sufficient to raise the questions involved in the appeal. If there is any special part of the record which counsel for the appellees believes should be printed, we would be willing to pay the expense of printing such portion, but we say that it is inequitable to insist on the printing of the entire record. All of the matters that were before the Interstate Commerce Commission itself are on file in the office of the clerk of the Supreme Court, and at any time are available both to the court and counsel. Ordinarily, the rule seems to be that where counsel cannot agree upon the record that the entire record should be printed and the matter be left to the court to determine as a matter of costs—the penalty for insisting upon an unreasonable amount of printing being that the costs may be taxed against the party so insisting, but in the instant case this rule cannot be invoked because here the Government and the Interstate Commerce Commission are the defendants and appellees, and if later it be determined that the appellees have designated for printing, a record of unreasonable length, the court would be powerless to give the appellants any relief because costs of printing may not be adjudged against the appellees.

If the motion is granted, provision may be made in the order for the appellees to refer to the plaintiffs' exhibit, the certified copy of the proceedings before the Interstate Commerce Commission, either on the oral argument, or in their briefs, and no harm may be done them. The bulky maps and schedules may be exhibited to the court if the appellees deem them of any consequence in determining the issue on appeal. In the court below the District Court contented itself with a reference to the pages of the printed opinion of the Interstate Commerce Commission, and from all that shows in that opinion, did not in any way review

the certified copy of the proceedings before the Commission. We have caused a copy of that opinion to be printed with this motion for the convenience of the court.

CONCLUSION.

In conclusion we respectfully ask that the court make an order allowing the diminution of this record, and that the appellants be only required to print those items designated in appellants' designation to print, a copy of which is annexed to the motion.

Respectfully submitted,

HARRY C. HOWARD,
Attorney for Plaintiffs and Appellants.

Dated May 1, 1925.

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In The

Supreme Court of the United States

October Term, 1925.

No. 312.

WESTERN PAPER MAKERS' CHEMICAL COMPANY, and
TANGLEFOOT COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA, and
THE INTERSTATE COMMERCE COMMISSION,

Appellees.

Appeal From the District Court of the United States for the Western District of Michigan.

Filed March 14, 1925.

(30,947)

BRIEF IN BEHALF OF PLAINTIFFS.

HARRY C. HOWARD,
Attorney for Plaintiffs.

Mich. Brief & Record Co., 4429 Field Ave., Detroit, Mich.

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Appellees.

Appeal From the District Court of the United States for the Western District of Michigan.

Filed March 14, 1925.

(30,947)

BRIEF IN BEHALF OF PLAINTIFFS.

STATEMENT.

This is an appeal from a final decree entered in the District Court for the Western District of Michigan dis-

missing a bill praying for an injunction to restrain the going into effect of an order of the Interstate Commerce Commission as affecting the through rate on rosin from south Atlantic and Gulf ports to Kalamazoo and Grand Rapids. *(Western Paper Makers' Chemical Co. v. U. S. et al., 7 Fed 2nd, 164.)*

The practice on rate making under the Interstate Commerce Act is as follows: The carriers publish a rate. If any shipper makes an objection to the rate the issue is joined on such objection and the rate is put upon what is known as the Investigation and Suspension Docket. An examiner takes the proof and the burden is then placed upon the carrier to justify the rate in issue. The proofs are heard before an examiner appointed by the commission and on the record so made the commission writes an opinion or order.

In the instant case the carriers published a rate. Among others the plaintiffs objected to the rate and an issue was made upon that objection and the proofs were taken. On a consideration of the record made in that case the commission found that the carriers had failed

(a) To justify the through rate on rosin to Kalamazoo and Grand Rapids,

(b) That the proposed rates were discriminatory against Kalamazoo and Grand Rapids when compared with Chicago and Milwaukee respectively,

(c) That the proposed rates were violative of the fourth section of the Interstate Commerce Act (the long and short haul clause),

and on its own motion the commission made an order permitting another rate, and thereupon the carriers published a rate in accordance with the suggestion of the commission and it is the rate so permitted by the commission of which complaint is made upon the three grounds:

1. That there was no evidence before the commission to justify its order.

2. That the order permitted a rate which was discriminatory against Kalamazoo and Grand Rapids and in favor of Chicago and Milwaukee.

3. That the rate permitted was violative of Section IV of the Interstate Commerce Act.

The court below (*7 Fed. 2nd, 164*) found against the plaintiffs on each of these contentions (R., 53) although we contend erroneously as more fully set out herein.

The hearing below was before three judges under Act Oct. 22, 1913, C., 32 (38 St., 220 U. S. Comp. St., 1916, Sec. 998) and the final decree dismissing plaintiff's bill was made January 3, 1925 (R., 52).

Originally the jurisdiction of rate questions was with the Commerce Court. When that court was dispensed with the jurisdiction was given to the District Courts and provision was made as stated above for the matters to be heard before three judges.

The Supreme Court declined to disturb on appeal an order granting a temporary injunction suspending an order of the Interstate Commerce Commission.

U. S. v. B. & O., 225; U. S. 306; 56 L. Ed., 1100.

The Supreme Court has declared that while the findings of the Interstate Commerce Commission of what are reasonable rates are administrative matters peculiarly within the powers of the commission and are not reviewed by the courts of the law, nevertheless, the validity of such findings must depend upon the presence of facts upon which they are based. The Supreme Court said:

> "A finding without evidence is beyond the power of the commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' *36 Stat., 551 Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184; 33 Sup. Ct., 893; 57 L. Ed., 1446; Ann. Cas., 1915-A, 315; Interstate Commerce Commission v. Louisville R. R. Co., 227 U. S. 88, 91; 33 Sup. Ct., 185; 57 L. Ed., 431; Interstate Commerce Commission v. Delaware, etc., Ry. Co., 220 U. S., 235, 251; 31 Sup. Ct., 392; 55 L. Ed., 448; Florida East Coast Ry. Co. v. United States, 234 U. S., 167, 185; 34 Sup. Ct., 867; 58 L. Ed., 267.*"
>
> *Chestnut Ridge Ry. Co. v. U. S., 248 Fed., 802.*

The rates involved in this controversy are on what are known as "naval stores." That term has its derivation from colonial times (R., 69), and related to "instructions for such things as are to be sent from Virginia." Pitch and tar being the chief products and those being used chiefly for the maintenance of sailing vessels, pitch and tar became known as "naval stores," and the name has endured (R., 70).

This case involves a through rate for rosin from points of origin south of the Ohio river to Kalamazoo and Grand Rapids. It must be borne in mind that a

through rate is something less than the sum total of the local or specific rates. It is a concession in the amount of the charge in consideration of the freight's moving all the way through from the origin in the south to the destination in the north. It is a wholesale rate for a long haul. It is a concession on the part of the carriers for the sake of having the business on the long haul. It is something similar to the concession that the hotel keeper makes to the guest who stays in the house week in and week out. The transient guest who stays only a day or two pays at a higher rate than the rate at which the guest who stays month after month pays. A through rate should always be less than the specific rates. It is a generally accepted principle of rate making that through rates should be less than the sum of the intermediate rates.

Chattanooga Packet Co. v. I. C. R. R., 32 I. C. C., 384.

ARGUMENT.

Prior to the proposed rates there has been an inequality in the old rate due to the fact that from interior points the rates were higher than from the ports or concentration points. The Western Paper Makers Chemical Company maintains plants at Jacksonville, Savannah, and Pensacola for refining rosin (R., 112). Both of the plaintiffs objected to the proposed rates and this proceeding finally resulted in the commission, on its own motion, indicating a different rate than that investigated, and these rates so permitted did result in reductions to Kalamazoo and Grand Rapids from many interior points, as well as increases from South Atlantic and Gulf ports. The Western Paper Makers Chemical Company has no rosin refineries at the interior points. It concentrates its shipments at their refining plants located at Jacksonville, Savannah, and Pensacola, and hence, their interest is chiefly in the rates from these points. This proceeding resulted in a general readjustment of rates in which there were both increases and reductions. Under such circumstances the carriers cannot point to the reductions as justification of the increases. The increase must be justified, if at all, entirely independent of the reductions.

The justification of the increased rates must go not only to the amount of the increase proposed, but also to the new rate after having given effect to the increase. In other words, in an investigation and suspension proceeding the new increased rate is in issue in its entirety. This is illustrated by the following:

The old rates from Pensacola are:

	Cinn.	Chicago	Kal.	Grand Rapids
	$ .27	$ .30	$ .345	$ .345
Increase in rate permitted by Com.	.06	.07	.045	.055
Totals through rate from Pensacola finally permitted	$ .33	$ .37	$. 39	$ .40

While Kalamazoo and Grand Rapids both got less increase than either Cincinnati or Chicago, they nevertheless have an incorrect rate because the old through rate to Kalamazoo and Grand Rapids was wrong, and the through rate in an investigation and suspension proceeding in its entirety is in issue, and not the component parts thereof, as the District Court seemed to contemplate (R., 58).

Thus certain questions are raised for consideration:

1. Was there any evidence justifying the increase in the suspended through rates? The answer is that the commission itself found there was not (R., 26).

2. Was there evidence justifying the increase as permitted by the commission, or an increase in the old rates, or of the new through rates as increased?

3. Can a through rate be justified by attempted justification of its component parts?

4. Did the rates established by the railroads under the permissive order of the commission result in undue discrimination between Kalamazoo and Grand Rapids, as in favor of Chicago and Milwaukee?

5. Can the commission permit the cancellation of rates and routes through intermediate points to prevent such intermediate points from maintaining its rights under the long and short haul clause of the 4th section of the Interstate Commerce Act?

When it was apparent that the permitted rates worked the injuries suggested in the paragraph above numbered 5, it became necessary for some means to be devised to escape, if possible, a violation of that 4th section. The method adopted is suggested in the opinion of the court below:

> "It is understood that the routing under the new adjustment will be so restricted as to remove the technical fourth section departures with respect to destination points hereinbefore referred to,"

which were Chicago, Milwaukee, Kalamazoo and Grand Rapids (R., 6). In order to make this point clear, consider by the way of illustration the former rates because the figures themselves do not matter. The old rates from Pensacola were 30c to Chicago and 34½c to Kalamazoo. Now, if that adjustment resulted in the violation of the 4th section which the commission said it did (R., 18), certainly there were numerous ways in which to remove the discrimination. The rate to

Chicago could be increased to 34½c, which would be one way; or the rate to Kalamaoo could be reduced to 30c, which is another way, but we insist that the commission could not permit the continuance of the 34½c to Kalamazoo and the 30c rate to Chicago by a mere rerouting of the traffic so that Kalamazoo becomes farther away than Chicago, which is geographically a physical impossibility whatever the commission may say about it, or whatever the lower court may have said about it. The absurdity of this is illustrated when we point to the fact that the carriers said that the key rate was Cincinnati (R., 91), with which the commission agreed (R., 15). Therefore, we say that the mileage to Kalamazoo and to Chicago would be figured through that key point, but to escape this the District Court said that by figuring the mileage to Chicago over the L. & N. through Evansville (not the key point taken by the carriers and the commission) and then over the C. & E. I. into Chicago, Chicago then becomes nearer Pensacola than Kalamazoo, provided, Kalamazoo's mileage is figured through Cincinnati. We insist that if for the purpose of removing the 4th section departure you abandon the key rate of the carriers and take some other route, then Kalamazoo and Grand Rapids should have the benefit of that same route. Rosin destined for Kalamazoo and Grand Rapids can move over the L. & N. and the C. & E. I. to Terre Haute, Indiana, and from there over the Pennsylvania to South Bend, Indiana, and hence over various routes into Kalamazoo and Grand Rapids, and when so figured, the mileage is substantially less than to Chicago figured over the identical route.

One of the reasons why the carriers and the commission used Cincinnati as the key point was to give

the initial carrier the longest haul (Cincinnati being somewhat farther than Evansville from Pensacola), (R., 96).

Under Section 15 of the act the commission suspended for investigation the proposed new rates. On the hearing before the commission the carriers introduced certain testimony, and after that investigation the commission decided adversely to the contention of the carriers and ordered the schedules canceled. In that opinion the commission, on its own motion, suggests certain rates as being just and reasonable, and thereafter the carriers published the rates suggested by the commission, and it is this order permitting the carriers to file these last mentioned rates that the bill of complaint attacks.

It was concerning this order that the court wrote its opinion (R., 53) and made its final decree (R., 52). The errors assigned are as follows (R., 62):

> "1. The court erred in denying said interlocutory injunction.
>
> 2. The court erred in considering evidence which had been excluded by the Interstate Commerce Commission in a proceeding before it on the investigation and suspension of the through rail rate on rosin from the gulf ports to Kalamazoo and Grand Rapids, Michigan, and in considering the testimony thus excluded by the commission as testimony upon which to base the said through rate on rosin as established by the Interstate Commerce Commission, which (fol. 73) rates from the South Atlantic and Gulf ports are as follows:

To	From Jacksonville	From New Orleans
Cincinnati	$ .33	$ .33
Chicago	.40	.37

Milwaukee	.41	.38
Kalamazoo	.40	.39
Grand Rapids	.41	.40
Detroit	.40	.40

3. The court erred in holding that the rates established by said Interstate Commerce Commission were not discriminatory as against Kalamazoo, Michigan.

4. The court erred in holding that the rates established by said Interstate Commerce Commission were not discriminatory as against Grand Rapids, Michigan.

5. The court erred in holding that the rates so fixed by the Interstate Commerce Commission were not in violation of the 'long and short haul' clause (Section 4), of the Interstate Commerce Act so far as concerns the through rates on rosin from the Gulf ports to Kalamazoo, Michigan.

6. The court erred in holding that the rates so fixed by the Interstate Commerce Commission were not in violation of the 'long and short haul' clause (Section 4), of the Interstate Commerce Act so far as concerns the through rate on rosin from the Gulf ports to Grand Rapids, Michigan.

7. The court erred in not holding that it was a shorter haul from the Gulf ports to the city of Kalamazoo, Michigan, than to the city of Chicago, Illinois, for the reason that the city of Kalamazoo is in fact a shorter distance by rail over the usual route.

8. The court erred in not holding that the city of Grand Rapids was a shorter distance from the Gulf ports than the city of Milwaukee, Wisconsin, when figured by the usual (fol. 74) route.

9. The court erred in considering the mileage from the Gulf ports to the city of Chicago by way of the Louisville & Nashville Railroad and Evansville, Indiana, and comparing that mileage with the mileage to the city of Kalamazoo, Michigan, figuring the latter mileage through the city of Cincinnati, Ohio, whereas if the mileage had

been figured to Kalamazoo over the Louisville & Nashville Railroad by way of Evansville, Indiana, the actual mileage to Kalamazoo would have been less than the mileage to Chicago figured over the same route.

10. The court erred in finding any evidence before the Interstate Commerce Commission sustaining the through rates as fixed by said Interstate Commerce Commission."

The plaintiffs are interested only in the through rate on rosin as distinguished from the other commodities that were involved in the order of the commission. The Western Paper Chemical Company at Kalamazoo, Michigan, is a large consumer of rosin in making rosin size. It uses about seven and one-half million pounds each quarter (R., 115). The other plaintiff uses about fifty cars of rosin per year in the manufacture of sticky fly paper (R., 151). The rosin size is used largely by the paper mills in what is known as the Kalamazoo district.

Jacksonville, Florida, is the largest market in concentration point for naval stores. Producers from the interior points ship their products chiefly in small quantities to Jacksonville, where they are graded and concentrated (R., 21). The same practice of concentrating and grading prevails at other South Atlantic and Gulf ports. Pensacola is the largest shipping point on the Gulf territory (R., 21).

Before the tariff in question was published there were joint through rates on rosin from the Gulf ports to certain points north of the Ohio river, viz:

To Chicago 30c
To Kalamazoo 34½c

To Milwaukee 33c
To Grand Rapids 34½c

(R., 27). There were also rates in effect from the South Atlantic ports and from points intermediate from the South Atlantic ports, and also intermediate to the Gulf ports to points north of the Ohio river, which rates were published in what is known and called sectional plan tariffs, which provided certain rates to be used to the Ohio river crossings and certain specific rates to be added to the rates to the river crossings, the sum of which made up the through rate to the ultimate destination; the through rate to be based on the cheapest combination so made. The rate arrived at in this manner from the South Atlantic ports at that time were:

To Chicago 39c
To Kalamazoo 39c
To Milwaukee 44½c
To Grand Rapids 44½c

(R., 30). These rates which we have set out are referred to in the finding of the commission as the "present rates" to distinguish them from what they in their opinion called the "suspended rate."

1.

NO EVIDENCE.

(1). Was There Any Evidence Justifying the Increase in the Suspended Through Rates?

(2). Was There Evidence Justifying the Increase as Permitted by the Commission, or an Increase in the Old Rates, or of the New Through Rates as Increased?

Section 15 of the Interstate Commerce Act lays down the rule as to how the published rates when under investigation shall be established, and it is there enacted:

> "The burden of proof to show that the increased rate when changed is just and reasonable is on the carriers"
>
> *Paragraph 5, Sec. 15, Interstate Commerce Act.*

Under the Interstate Commerce Act the burden of proving the reasonableness of a rate under investigation is placed on the carriers. Certain of the carriers south of the Ohio river offered some evidence, not as to the through rates on rosin to destination, but as to the rate to points on the Ohio river such as Cincinnati as a "key point," and other Ohio river crossings. Of this testimony the commission said:

> "Very little evidence was introduced in support of the through rates, the southeastern and Mississippi valley carriers apparently proceeding on the theory that they were required to justify only the rates to the river crossings and that the burden of supporting the proportions of the rates beyond the crossings rested upon the central lines.

> All of the rates in the proposed revision are published as through rates and the burden of proof is upon the respondents to justify them as such" (R., 18).

While the commission said there was "very little evidence," the record shows that there was none at all justifying this through rate. This matter was argued at length in the District Court and the court said:

> "But while we are cited to no direct testimony of the reasonableness of any one through rate or specific, there was testimony tending to show that the suspended rates south of the river as factors, were reasonable" (R., 57).

After the carriers had offered their proofs in relation to the rates, the examiner finally said:

> "Examiner Carter: I would like to find somebody who is going to attempt to justify the rates to Kalamazoo and Grand Rapids. Yesterday the witness passed it on to the Central Freight Association lines, and the Central Freight Association lines have stated their position. Now, if there is any particular justification further than what you have already put in, I think we ought to have it. * * *
>
> Examiner Carter: Yes. Perhaps I did not make my question as clear as it should have been. I should have said, 'No justification has been offered of the alleged discrimination against those two points" (Kalamazoo ond Grand Rapids, R., 105).

The representative of the Central Freight Association lines, when the matter was passed on to him, said:

> "I claim no particular knowledge of conditions at the South Atlantic ports. Anything I have said is not in justification of the joint through rates

> as published from these ports to points north of the Ohio river. We are attempting only to justify our specifics. We are offering no justification of the joint through rates from the Mississippi valley" (this statement includes the whole producing territory, R., 103).

We will quote from the testimony of all the witnesses called by the carriers on this investigation to show that none of them undertook to justify the through rates:

Witness Doss for the carriers, said:

> "I had not intended filing a statement showing all specifics to and from all Ohio river crossings to all points of destination as they were furnished to us by the northern lines. The C. F. A. lines are here. I assume they will probably do so. I do not know, however. I would much prefer that you get it from the lines who are represented here who fixed these proportions. In filing this exhibit I was merely trying to show just how we arrive at these through rates, the suspended rates" (R., 78).

Witness Cook said:

> "I am not undertaking to justify that increase to Grand Rapids of more than double the increase to Chicago. We made the rates over Ohio river; the arbitraries furnished us by the C. F. A. lines. I am not undertaking to justify the proposed through rates published in this tariff" (R., 97).

Witness Drescher said:

> "I am not trying to justify the rate to Kalamazoo; I am justifying the rate by our relationship. I attempted to justify it by our relationship of our rates to the rates of the Illi-

> nois Central. If the Illinois Central cannot justify it, we cannot justify it" (R., 100).

Witness Mathews said:

> "Anything I have said is not in justification of the joint through rates as published from these ports to points north of the Ohio river. We are attempting only to justify our specifics" (R., 103).

These are the only witnesses of the carriers who testified upon the subject of the through rates. There were two other witnesses called, but they testified in regard to matters not in controversy.

3.

Can a Through Rate Be Justified by Attempted Justification of Its Component Parts?

The references here are to all the testimony that might possibly relate to a through rate and shows clearly that there was no testimony of any kind offered, nor was there any before the commission of any kind, to justify the rates suggested in the opinion of the commission. On this record the Interstate Commerce Commission itself said:

> "Upon this record we find that the proposed increased rates have not been justified" (R., 28).

The error into which the court below fell was in considering the specifics instead of the through rate, which brings us to the question of the rules of the Interstate Commerce Commission as to what should be considered in determining the reasonableness of a joint through rate, and the commission has said that

a joint through rate must be considered in its entirety, as in construction of a combination patent composed of old elements.

> *Wichita Board of Commerce v. The Director General, 81 I. C. C., 423.*

The commission has stated over and again that the separate factors in a through rate are not the things to consider, but the rate of the charge as a whole is the matter to which the test of reasonableness must be applied.

> *Peoples Fuel & Supply Co. v. G. F. W. Railway Co., 30 I. C. C., 657.*

The finding of the court below that there was some evidence upon which the commission might have based its conclusion was predicated entirely upon the evidence as to the specific rates (i. e., the elements and not on the entirety).

In this very case the commission itself has defined a specific:

> "A specific is said to be neither a local rate nor a division of a through rate, but in the nature of a proportional rate published to apply on this particular class of traffic" (R., 12).

The commission indicates throughout its opinion time and again that the reasonableness of the proposed rates was not sustained, and then on its own motion and without any evidence (other than that evidence which it held insufficient to sustain the proposed rates then under investigation), concludes that some other rate would be reasonable and just, and suggests a rate which the carriers adopted and published and which

the District Court sustained. The commission had no right to do this unless there was some evidence in the record which would justify the rates which the commission suggested, or any increase of the then existing rates. On another occasion the Interstate Commerce Commission undertook to base its findings upon annual reports of some of the carriers which were among its files, although not offered as evidence in the particular proceedings in which they made the findings, and the Supreme Court has said, after discussing the matter at length:

> "The matter improperly entered and treated as evidence may have been an important factor in the conclusion of the commission. The order must therefore be ordered void."
>
> *U. S. v. Abilene & So. Ry. Co., 68 L. Ed. (No. 16 Advance Sheets, June 16), 594 (Orient case).*

In the instant case the commission found that there was no justification at all for the through rate. The District Court in passing upon the question of whether there was any evidence before the commission that would justify its order, said that its attention had been called to no "direct testimony of the reasonableness of any one through rate of specific," and then continued to state that there was testimony tending to show that the suspended rates from the Ohio river crossings on the basis of all rates south of the river as factors, were reasonable, and then the court continued:

> "and we think for this and other reasons there cannot be said to be an absence of competent evidence thereof" (R., 57).

The court then takes up further the question of the

specific, and takes apart the through rate and concludes that the specifics north of the river used in making up the through rate published on the permissive order of the commission is less than the specific formerly in use, and therefore, it is probably reasonable. There is a difference between explaining the mechanics of a rate, which the court was doing, and justifying the reasonableness of a rate. The propriety of a through rate must be sustained by evidence of a probative nature showing satisfactory reasons for the increase and that a higher rate is reasonable.

Echols & Co. v. A. & W. Ry., 34 I. C. C., 644.

It is not sufficient to show that the proposed increased rates are made in conformance with previous practice, or in accordance with a basis of long standing. None of these considerations are, of themselves, sufficient justification. *Class and Commodity Rates from Illinois and Other States, 75 I. C. C., 59. Silica from Southern Illinois, 73 I. C. C., 406. Butter, Eggs, and Dressed Poultry from Texas, 73 I. C. C., 466.* All of these cases cited from the commission's own rulings are investigation and suspension cases under Section 15 of the act like the one in the instant case.

On the hearing the attention of one of the witnesses for the carriers was called to the discrimination against Kalamazoo and Grand Rapids, and the witness testified as follows:

> "Our increase from the ports to Cincinnati is 6 cents, so that our total increase, due to the increase to the river and increase in the specific beyond, is 8½ cents. As to why we are increasing the rate to 13 cents—the necessity of

> a greater increase at Kalamazoo than at the other points: I don't recall; I don't know just what that is. * * *
>
> The increase on rosin to Chicago from the Gulf ports is 7 cents, and to Grand Rapids it is proposed to increase the rate 13½c. I am not undertaking to justify that increase to Grand Rapids of more than double the increase to Chicago. We made the rates over Ohio river; the arbitraries furnished us by the C. F. A. lines. I am not undertaking to justify the proposed through rates published in this tariff" (R., 97).

If the course approved by the District Court of considering specifics to provide a through rate were followed and the carriers are consistent, the increase on Kalamazoo in the proposed rate and the rate under investigation should have been not to exceed 8½c higher, yet they proposed to increase it to 13c, and so far as the rate to Grand Rapids is concerned, they did not tell what the specific was. They contented themselves by showing an increase of 13½c and which they said they could not justify.

In determining through rates you are dealing with an entirely new thing—as an entirety. A through rate is not the sum of several specific rates from place to place, but it is something entirely different—a wholesale price—and a through rate should always be less than the sum of the specifics. That is to encourage through traffic—long hauls. The commission recognized this principle in this very case, saying:

> "We are of the opinion, however, that the combination basis is not justified and that there is no controlling reason why through rates lower than those resulting from the combination on the

Ohio river gateways should not be established" (R., 26).

The commission, skilled in traffic matters, said positively that the through rates should be less than the sum of the specifics and that opinion when so expressed calls for a less rate than was suggested at the time the commission expressed that opinion. The rate then in force at the time of the investigation of the proposed rate to Kalamazoo, Michigan, from South Atlantic ports was 39c (R., 30). The rate made under the permissive order of the commission and approved by the District Court was 40c (R., 55).

4.

Did the Rates Established by the Railroads, Under the Permissive Order of the Commission, Result in Undue Discrimination Between Kalamazoo and Grand Rapids and in Favor of Chicago and Milwaukee?

The commission said:

> "The central lines testified that there is no justification for a lower rate to Chicago than to Kalamazoo from the southeast or from Pensacola and admitted that Kalamazoo is discriminated against in favor of Chicago by both the present and proposed rates" (R., 23).

The rates as approved, are as follows:

Chicago	40c and 37c
Kalamazoo	40c and 39c
Milwaukee	41c and 38c
Grand Rapids	41c and 40c
Detroit	40c both routes

(R., 55).

The court below refers to the fact that the rate to Chicago is due to the fact that the Illinois Central owns its own rails from New Orleans to Chicago. The court says on this subject:

> "The Illinois Central controls the rates from New Orleans to Chicago, and hence to Milwaukee, and that other carriers serving New Orleans and the other Gulf ports meet the New Orleans-Chicago rate so made. We think that neither these findings nor the basing of the Mississippi valley rate to Milwaukee upon the Chicago rate can be pronounced arbitrary or beyond the commission's authority" (R., 60).

Both the commission and the court are in error in this regard because justly and equitably if Milwaukee, which is not on the line of the Illinois Central, is to have the benefit of the rate made by the Illinois Central owning its own lines from New Orleans to Chicago, then by the same token, both Kalamazoo and Grand Rapids ought to have a like benefit. Milwaukee is not on the line of the Illinois Central, neither is Kalamazoo nor Grand Rapids.

In reference to the rates to Chicago, the commission said:

> "There is no evidence to show that the rates of the Illinois Central to Chicago are on less than a reasonable basis" (R., 24).

It naturally follows from this that if the rate to Chicago, which is a distance of something over nine hundred miles, is not on less than a reasonable basis, that a like rate should prevail for every other place that is within a similar distance. For example: Kalamazoo is nearer Pensacola than Chicago by 37 miles, and Grand Rapids is not over 50 miles from Kalama-

zoo. Or in other words, Grand Rapids is only 12 miles farther from Pensacola than Chicago, yet the discrimination in the rates is out of all proportion to such distances. Many times the commission has had to deal with the reasonableness of rates covering a considerable distance and where there has been more than one carrier, and it has laid down the rule that when distances of over 500 miles are involved, the fact that the service is by two lines instead of one is largely negligible so far as it applies to the reasonableness of the rate.

> *Calivada Fertilizer Co. v. Southern Pacific, 73 I. C. C., 496.*

In numerous cases the commission has prescribed rates based on distance and in such cases it almost invariably provides that for distances of 500 miles and more, the rate should be the same whether for two lines or joint line applications. Some comparatively recent decisions are the following:

> *Memphis Southwestern Investigation, 77 I. C. C., 473.*
>
> *Board of Railroad Commissioners of the State of South Dakota v. C. & N. W. Ry. et al., 77 I. C. C., 451.*
>
> *Armour & Co. v. C. of Ga. Ry. et al., 81 I. C. C. 33.*
>
> *Corporation Commission of Oklahoma v. Arkansas R. R. et al., 80 I. C. C., 607.*
>
> *Inland Crystal Salt Co. v. B. A. & P. Ry. et al., 78 I. C. C., 659.*

In this connection the commission said:

5.

Can the Commission Permit the Cancellation of Rates and Routes Through Intermediate Points To Prevent Such Intermediate Points From Maintaining Its Right Under the Long and Short Haul Clause of the 4th Section?

The 4th Section of the Interstate Commerce Act makes unlawful the charging of a higher rate for a shorter than for a longer distance, the shorter being included in the longer. If there is any reason why that provision should be violated, the carrier is required to apply to the Interstate Commerce Commission for permission to put in force a rate which is in violation of that 4th section. It is only on the application of the carrier in that regard that the commission may act. In the rate approved by the District Court there is a direct violation of this section, and no carrier has applied to the commission for permission to violate the section. In fact, in this very proceeding the carriers declined to plead for any such indulgence (R., 23).

> "The central lines testified that there is no justification for a lower rate to Chicago than to Kalamazoo from the southeast or from Pensacola and admitted that Kalamazoo is discriminated against in favor of Chicago by both the present and proposed rates" (R., 23).

The rate approved by the court to Chicago was without any justification by any of the carriers in the proceeding before the commission, and in fact, there is no evidence of any kind to justify it, and of that rate the commission, itself, said:

> "There is no evidence to show that the rates

of the Illinois Central to Chicago are on less than a reasonable basis" (R., 24).

Also:

> "None of the respondents offered any justification of the fourth section departures at Grand Rapids and agreed that such departures as may exist should be removed" (R., 25).

The court in its opinion said:

> "It is understood that the routing under the new adjustment will be so restricted as to remove the technical fourth section departures with respect to destination points hereinbefore referred to,"

which were Chicago, Milwaukee, Kalamazoo and Grand Rapids (R., 60-61).

This reference to routing simply means this:

That the carriers are to be permitted to drop from their published tariffs the previously existing rate and route to Chicago which applied through Kalamazoo and to Milwaukee which applied through Grand Rapids, for the purpose of escaping the violation of Section 4 of the Interstate Commerce Act. This the carriers could not lawfully do. On this very subject, the commission said:

> "The cancellation of the commodity rates has the effect of leaving higher rates the only ones applicable. It is therefore an instance of increased rates in which the burden is upon respondents to prove the reasonableness of the increased rates. This they have not undertaken to do, except by showing that traffic did not move under the lower rates."

Sandstone-Missouri River Building Stone Rates, 1913, 28 I. C. C. Rep., 268-270, et seq.

The rate to Cincinnati was described by the carriers at the suspension hearing as being the "key rate" to the territory beyond and to the other Ohio river crossings as well (R., 15-16).

As the carriers use Cincinnati as the "key rate" to the territory beyond, it is unfair to deprive Kalamazoo and Grand Rapids of the right to figure their most advantageous mileage through Cincinnati, and to accord to Chicago the right to figure its mileage over the L. & N. through Evansville, and the C. & E. I. into Chicago. But if the District Court were right in considering that Chicago mileage might be figured through Evansville (not over the Illinois Central single line) then Kalamazoo should have the same privilege, and if the mileage to Kalamazoo is figured over the L. & N. through Evansville, and then via Terre Haute and South Bend, Indiana, Kalamazoo's mileage is substantially less than the mileage to Chicago, and the mileage to Grand Rapids when so figured would be correspondingly reduced. In other words, if the carriers consider Cincinnati to be the gateway (the key), then all the rates should figure through Cincinnati. If Cincinnati is the key to figure all the rates, then all the traffic should be counted through Cincinnati. The Illinois Central rails do not go through Cincinnati and hence it is entirely fallacious to excuse this unlawful and unreasonable rate on account of the fact that the Illinois Central owns and operates its own rails from New Orleans to Chicago.

CONCLUSION.

While the court below said that there was no direct testimony as to the reasonableness of the through rate, yet to sustain the commission the court took the very testimony which the commission itself had expressly excluded. The examiner who had the matter in charge said:

> "I will rule that I will accept these exhibits at this time for the purpose of showing the historical, chronological situation of the specifics, and so forth, and I will reserve my ruling on the others until later in the hearing. But at this time they are received simply for that purpose and not as a justification for the through rate" (R., 141).
>
> "Also (October 5, 1923): 'I might say that my ruling on Matthew's Exhibits 85 and 86 was deferred the other day on the question of justifying the measure of the rate north of the river. I sustain the objection to those exhibits for that purpose, and admit them, as I stated before, for the purpose of showing the historical, chronological situation" (R., 141).

The court below, in order to find some evidence upon which to base the reasonableness of the through rate, considered this evidence which the commission, itself had excluded, and the effect of the decree below is to put back into the record this evidence which the commission declined to consider on the question of the reasonableness of the through rate. On the investigation, the southern lines in offering evidence of the rate to Cincinnati, did not offer that evidence as a justification of the through rate to Kalamazoo and Grand Rapids, but offered it as evidence of reasonableness of

the rate to Cincinnati, itself. Had it been offered as justification of the through rate it would have been excluded by the examiner the same as he excluded the evidence of the reasonableness of the specific north of the river as justification of the through rate. A long continued existence of an established rate might be evidence of the reasonableness of that particular rate, but it can never be evidence of the reasonableness of any other rate, for if it were otherwise, the carrier need only publish a rate and if questioned, sustain the burden of proof which the statute places upon the carrier by citing the old rate.

When a railroad company, advancing a rate which has been for some time in force, the fact of its continuance is in the very nature of things an admission against the railroad company, which tends to show the unreasonableness of the advance, rather than an evidenciary fact to be considered by the commission as a justification of the old rate.

Central Yellow Pine Association v. Ill. Central Railroad, 10 I. C. C., 505.

The court below seemed to be of the impression (R., 58) that the long continued existence of established rates made up of the key rate to the river and specific was at least some justification of the new specific. The court seemed to entertain the view that because the new specific from the river to Kalamazoo and Grand Rapids was less than the old specific that it was some evidence that the rate was reasonable. The unfortunate part about that is that it does not work out that way. This is illustrated in the proceeding before the commission. In the testimony of Mr. Cook, general freight agent of one of the carriers:

"Our increase from the ports to Cincinnati is

> 6 cents, so that our total increase, due to the increase to the river and increase in the specific beyond, is 8½ cents. As to why we are increasing the rate to 13 cents—the necessity of a greater increase at Kalamazoo than at the other points: I don't recall; I don't know just what that is. * * *
>
> The increase on rosin to Chicago from Gulf ports is 7 cents, and to Grand Rapids it is proposed to increase the rate to 13½ cents. I am not undertaking to justify that increase to Grand Rapids of more than double the increase to Chicago" (R., 97).

The rate which the commission permitted on its own motion in the instant case was a higher rate than the carriers had published in their proposed new rate. The evidence which the court below found a justification of the reasonableness of the rate was admitted in the case for chronological purposes only, and consequently, it could not be considered for any other purpose, and the commission would have no more right to base its order on that than it would on anything else that might be in its files, such as annual reports or carriers dealing with rates even over the same route.

> *U. S. v. Abilene & Co. Ry. Co., 68 L. Ed., 594 (Orient case).*

However, if the reasonableness of the specifics may be considered, then the record shows that the rates or the specifics to the river are the same from all the producing points whether they were interior or Gulf ports, and the record showed that to make the through rate the carriers north of the river gave the same specifics to both Chicago and Kalamazoo, so the conclusion must be inevitable that both Chicago and Kalamazoo should have exactly the same rate.

On the question of discrimination, the commission said:

> "The southeastern and Mississippi valley lines offered no justification of such departures as may exist in the proposed adjustment, and the central carriers stated that there is no justification for such departures at points of destination in their territory" (R., 18).

All the rates in the proposed revision are published as through rates and the burden of proof is upon the respondents (carriers) to justify them as such (R., 18).

> "The central lines testified that there is no justification for a lower rate to Chicago than to Kalamazoo from the southeast or from Pensacola and admitted that Kalamazoo is discriminated against in favor of Chicago by both the present and proposed rates. They stated that the same specifics to both points for the haul north of the Ohio river were furnished to the southern lines and that they had no part in the adjustment which published lower rates to Chicago. Kalamazoo consumes greater quantities of rosin than Chicago and must compete in the sale of rosin size with producers at that point and also at points in eastern territory" (R., 23).

What was said here by the commission was not only true of the present and proposed rates, but it was equally true of the rates finally permitted on the commission's own motion. Such being the case, it seemed entirely clear that the rate permitted by the commission in its order violated the clause in the Interstate Commerce Act which related to discrimination in the rate to be charged in transportation of goods to the different cities. The commission in its opinion found a violation of the long and short haul clause of the

4th section of the act so far as Grand Rapids was concerned, saying:

> "None of the respondents offered any justification of the fourth section departures at Grand Rapids and agreed that such departures as may exist should be removed" (R., 25).

The rates permitted on the commission's own motion were likewise a departure from the fourth section, and there was no justification or evidence in the record of any kind to justify the commission's order in permitting this discrimination against Grand Rapids. So far as Kalamazoo was concerned, the commission expressly found:

> "The central lines testified that there is no justification for a lower rate to Chicago than to Kalamazoo from the southeast or from Pensacola and admitted that Kalamazoo is discriminated against in favor of Chicago by both the present and proposed rates" (R., 23).

The commission, in its order which the court declined to enjoin, permitted on its own motion another rate, but the rate which they allowed did not remove the fourth section violation because such rate permitted by the commission is a higher rate for a shorter haul. When the rate is computed as to mileage through the same gateway; that is to say, if the through rate on rosin is figured to Chicago through Cincinnati (which carriers testified was the "key rate," and gateway through which the products naturally pass), and the through rate to Kalamazoo is figured through the same gateway, then Kalamazoo is 37 miles shorter than to Chicago. In the opinion of the court it is pointed out that Chicago is a shorter haul than Kalamazoo, but that is only when you figure the Kalamazoo mileage

through Cincinnati gateway and figure the Chicago mileage over the L. & N. through Evansville and the C. & E. I. into Chicago. Our reply to that is that it is the natural way that traffic travels rather than the possible way, that determines the fourth section violation. However, if to sustain the through rate to Chicago, the mileage is to be figured through the route traveled by the L. & N. and Evansville, then the through rate to Kalamazoo should also be figured through the same Evansville, Terre Haute and South Bend, Indiana, then mileage to Kalamazoo when so figured is substantially less than to Chicago. It is only fair to compute the distance by the crossings of the Ohio.

While we insist that there is no evidence to sustain the rates permitted by the commission on its own motion, even if we err in that regard, surely the rates so permitted are violative of both Sections 3 and 4 of the act. They discriminate against both Grand Rapids and Kalamazoo and they charge both Grand Rapids and Kalamazoo, which are shorter distances in miles, a greater rate than they charge Milwaukee and Chicago respectively. Hence, we urge that the court erred in the denial of the preliminary injunction and we respectfully ask that the decision below be reversed.

Dated March 2, 1926.

Respectfully submitted,

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